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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KENNETH HUNTER WILDER, Defendant and Appellant.	H043486 (Santa Cruz County Super. Ct. No. F28378)

Defendant Kenneth Hunter Wilder was convicted by a jury of one felony count of attempted possession of child pornography (Pen. Code, §§ 664, 311.11, subd. (a)),[1] one felony count of attempted use of a minor for sex acts (§§ 664, 311.4. subd. (c)) and one misdemeanor count of annoying or molesting of a child (§ 647.6). The trial court suspended imposition of sentence and placed Wilder on formal probation for three years.

On appeal, Wilder raises the following arguments: (1) there was insufficient evidence presented at trial to support his felony convictions; (2) the trial court erred by refusing to provide a pinpoint instruction to the jury; (3) the trial court erred in not excluding the statements he made to police as they were involuntary and coerced; (4) one of the probation conditions imposed, which prohibits him from possessing "any children's toys, games, clothing, etc.," is unconstitutionally vague and overbroad; and (5) the trial court failed to award him conduct credits as required by section 4019.

[1] Unspecified statutory references are to the Penal Code.

For the reasons expressed herein, we find that the evidence presented at trial was insufficient to support Wilder's convictions for attempted possession of child pornography and attempted use of a minor for sex acts, and we shall reverse the judgment. Based on our disposition, we need not address Wilder's remaining arguments.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Criminal charges

Wilder was charged by information filed November 16, 2015, with one felony count of using a minor for sex acts (§ 311.4, subd. (c), count 1), one felony count of possession of child pornography (§ 311.11, subd. (a), count 2), one felony count of second degree commercial burglary (§ 459, count 3), one felony count of attempted possession of child pornography (§§ 664, 311.11, subd. (a), count 4), one felony count of attempted use of a minor for sex acts (§§ 664, 311.4, subd. (c), count 5), and one misdemeanor count of annoying or molesting a child (§ 647.6, subd. (a)(1), count 6).

B. The prosecution's case

On April 2, 2015, I.G., then 16 years old, went to the Santa Cruz public library to do some research for a school project. Her mother dropped her off at the library sometime in the afternoon. I.G. was wearing a long sleeve shirt, sneakers, and short jean shorts. After finding the section of the library with books relevant to her project, I.G. selected some books from a shelf and sat at a nearby table to work. No one else was in that portion of the library at the time. I.G. estimated that the table she sat at could seat as many as eight or 10 people, and she sat approximately in the middle.

After she sat down again with her books, I.G. realized she had forgotten her cellphone in her mother's car. She returned to the front desk and used the library telephone to call her mother to bring her cellphone to her.

I.G. returned to the table and resumed her research. After she was at the table for some time,[2] a man she did not know, later identified as Wilder, came and sat directly in front of her. Because the library was still empty, I.G. thought it was strange that he would deliberately take a seat directly across from her and it made her uncomfortable. Wilder did not have any books with him.

At first, Wilder simply sat there, but then I.G. testified he began "looking under the table and . . . banging on it." She was confused and bothered by his behavior, so she eventually asked if she could help him. Wilder was wearing headphones, so she did not know if he heard her. Soon after, Wilder disappeared completely under the table, although he kept banging on the table from underneath. I.G. could not remember how long Wilder was under the table, but it seemed like a long time to her. She did not look under the table to see what Wilder was doing. I.G. was uncomfortable, scared and unsure what to do.

Wilder came out from underneath the table and, a few minutes later, her mother's friend came in to the library with her cellphone. I.G. let her know that Wilder was making her uncomfortable, so she and her mother's friend went to talk to a library employee about it.

I.G. then moved to a smaller table nearer to the front desk. Her mother's friend gave I.G. her cellphone, then left. I.G. resumed her work, but within a half hour, library staff came up to her and asked if she would be more comfortable sitting in an area upstairs, which is restricted to minors. She got up and gathered her things, then noticed that Wilder was behind her. He was crouched down, "like looking at the bookshelf right behind" her. She again felt uncomfortable and scared because she had not noticed he had followed her to where she had moved. I.G. ran upstairs but even there she did not feel

[2] I.G. could not recall how long she had been sitting at the table before she encountered Wilder.

safe, thinking he would follow her even to an area restricted to minors. A police officer later came upstairs to talk to her about what happened and to have her identify Wilder.

Devon Reyes was working as an aide at the library on April 2, 2015. On that afternoon, she was shelving books as she usually does. She was pushing her cart down one of the rows when she noticed a man, later identified as Wilder, near the floor extending his phone between the books on the lower shelf. Reyes saw that Wilder was pointing the phone toward a young girl seated at a table just behind the bookshelf. The girl's side was facing the bookshelf behind which Wilder was kneeling, and Reyes heard one click as he took a photo.

Reyes then saw him walk around to the other side of the bookshelf, nearer to the girl's table. Wilder was kneeling on the floor as if he were looking at the books, but he had the phone behind his back, pointed at the girl. Reyes knew this was wrong, so she went to tell her supervisor what Wilder was doing. Her supervisor called the police department and the library security guard.

Reyes returned to shelving books and was subsequently contacted by Santa Cruz police. The officer asked Reyes to go upstairs and have I.G. come down to answer some questions. Reyes went up and told I.G. the police would like to talk to her about the man Reyes had seen taking pictures of her. The police had Reyes go outside, where she identified Wilder as the man she had seen taking photos of I.G.

James Lee, the library's branch manager, was working at the service desk on April 2, 2015, when he was approached by an adult woman who told him that a minor (I.G.) needed assistance "getting away from someone who was bothering her." Lee saw I.G. sitting at a table in front of the service desk, and after the adult left, Lee approached I.G. and told her there was an area restricted to minors upstairs if she would rather sit there.

When Lee went back to the service desk, Reyes came up within a minute or two and told him she had seen Wilder taking pictures of I.G. Lee called the library security officer to tell him what happened and asked him to call the police.

Lisa Laracuente was at the Santa Cruz public library on the afternoon of March 31, 2015,[3] when she saw Wilder "squatting next to a table, looking across at another table where a young woman was seated." Laracuente estimated the woman was approximately four or five feet away from Wilder. The young woman, who "looked young, maybe 14, 15 years old, blonde," was wearing a short skirt, and "[i]t seemed . . . [Wilder] was looking up her skirt."

Detective David Pawlak, a digital forensic examiner with the Santa Cruz Police Department, testified that he analyzed Wilder's cellphone data. Pawlak located a video file on Wilder's cellphone from April 2, 2015, at 12:38:53 p.m.[4] He also found several photos on the device and I.G. identified some of the pictures and the video as being of her, taken from underneath the table at the library. The video and photographs were displayed to the jury and admitted into evidence.

Wilder was interviewed at the police station after waiving his *Miranda*[5] rights. The videotape of that interview was played for the jury. Wilder admitted sitting across from I.G., who he said, "looked like she was 15, 16," at a table in the library. Wilder thought I.G. was "cute," and was listening to music on his phone when he sat at the table. When she got up to move to another table, he "realized how nice of a butt she had," so he

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[3] The events which formed the basis for the instant prosecution took place on April 2, 2015, so Laracuente was testifying about a different, uncharged, incident.

[4] The Attorney General notes that the video Wilder took of I.G. underneath the table "formed the basis for the charges in counts one and two [i.e., using a minor for sex acts and possession of child pornography] which were ultimately dismissed." Counts 4 and 5 were based on Wilder's separate attempts to get a "butt shot" of I.G. through the bookshelf. Accordingly, we do not directly consider the video in evaluating the sufficiency of the evidence to support Wilder's convictions on counts 4 and 5.

[5] *Miranda v. Arizona* (1966) 384 U.S. 436.

tried to get a photograph of her rear end. He went to the bookshelf behind where she was sitting, looked at the books "for a minute" then turned on the camera on his phone to try to take photos of her rear. He took perhaps five photographs, but they were "blurry as hell" so he deleted all of them.[6] Wilder admitted he took the photographs to "try to get like some kind of arousement [*sic*] out of it" so he could "go jack off."

Wilder wrote an apology letter to I.G., which was introduced into evidence. He started, but did not complete, three other letters as well,[7] which he wadded up and discarded.

C. Defense case

The defense called Katrina Rogers, an investigator employed by the Santa Cruz County District Attorney's Office. Rogers interviewed Laracuente on December 9, 2015, in connection with this case. In that interview, Laracuente told Rogers that she observed Wilder at the library "crouched down as if he was looking at a book on the [bottom] shelf of the bookshelf, but, in fact, [he was] looking at a woman seated at a nearby table." Defense counsel clarified that Laracuente said "woman" and not "teenager," "young adult," or "young one." Rogers also testified that Laracuente never said anything about Wilder looking up the woman's skirt and, when Rogers asked if she saw Wilder holding a camera, Laracuente said, " 'No.' "

D. Verdict and sentencing

The jury found Wilder not guilty on count 3 (second degree commercial burglary, § 459) and guilty on count 4 (attempted possession of child pornography, §§ 664, 311.11, subd. (a)), guilty on count 5 (attempted use of a minor for sex acts, §§ 664, 311.4, subd. (c)), and guilty on count 6 (misdemeanor annoying or molesting a child, § 647.6).

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[6] These photographs were apparently not recovered from Wilder's cellphone and thus were not shown to the jury or introduced into evidence.

[7] Two of these letters began "Dear [I.G.]" and the third began "Dear Judge." The three crumpled letters were recovered by police from the interview room and introduced into evidence.

The court declared a mistrial on count 1 (using a minor for sex acts, § 311.4, subd. (c)) and count 2 (possession of child pornography, § 311.11, subd. (a)) after the jury was unable to reach a verdict on those charges.[8]

At the March 28, 2016 sentencing hearing, the trial court suspended imposition of sentence and ordered Wilder to serve three years formal probation, including a county jail sentence of 339 days, with 339 days credit for time served.

Wilder timely appealed.

II. DISCUSSION

A. No substantial evidence to support convictions on counts 4 and 5

Wilder argues there was insufficient evidence to support his convictions for attempted possession of child pornography (§§ 664, 311.11, subd. (a)) and attempted use of a minor for sex acts (§§ 664, 311.4, subd. (c)). I.G. was fully clothed in the photographs Wilder took at the library and thus there could be no "exhibition" of her genitals, pubic, or rectal area as required by statute. We agree.

1. Applicable legal standards

In reviewing a challenge to the sufficiency of the evidence, we must " ' "review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt." ' " (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.) In so doing, we do not reweigh the evidence or substitute our judgment for that of the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Section 311.11, subdivision (a), provides in pertinent part: "Every person who knowingly possesses or controls any matter, representation of information, data, or image, including, but not limited to, any . . . photograph . . . the production of which

[8] On April 15, 2016, the Attorney General dismissed both of these counts pursuant to section 1385.

involves the use of a person under 18 years of age, knowing that the matter depicts a person under 18 years of age personally engaging in or simulating sexual conduct, as defined in subdivision (d) of Section 311.4, is guilty of a felony."

Section 311.4, subdivision (c), provides: "Every person who, with knowledge that a person is a minor under the age of 18 years . . . knowingly . . . employs, [or] uses[] . . . a minor under the age of 18 years . . . to engage in . . . either posing or modeling alone or with others for purposes of preparing any representation of information, data, or image, including, but not limited to, any . . . photograph . . . involving[] sexual conduct by a minor under the age of 18 years alone or with other persons or animals, is guilty of a felony."

The definition of "sexual conduct" as used in both sections 311.11, subdivision (a) and 311.4, subdivision (c) is set forth in section 311.4, subdivision (d)(1), which provides in relevant part: " 'sexual conduct' means any of the following, whether actual or simulated: . . . exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer . . . . An act is simulated when it gives the appearance of being sexual conduct."

2. Analysis

In this case, we must decide whether the photographs of I.G. taken by Wilder, which he subsequently deleted, fall within the definition of "sexual conduct" as provided in section 311.4, subdivision (d)(1). We start by noting that it is well-established that the term "exhibition" for purposes of describing sexual conduct is *not* limited to nude displays of a victim's genitals, pubic, or rectal areas. (*People v. Spurlock* (2003) 114 Cal.App.4th 1122, 1128.) At the same time, not all partially clothed displays will constitute an "exhibition," and thus qualify as sexual conduct, under the statute. (*Ibid.*) "Nudity is not sufficient, but it is also not strictly necessary. . . . Whether a particular display is an illicit exhibition is a more complicated inquiry than simply asking whether the genitals are exposed. Photographs showing a partially clad pubic area may well be

intended to elicit a sexual response on the part of the viewer." (*Id*. at p. 1129.) In other words, whether images carry a provocative or sexual overtone presents a question of fact for the trier of fact. (*People v. Kongs* (1994) 30 Cal.App.4th 1741, 1755 (*Kongs*).)

Kongs lists six factors[9] a trier of fact should consider in determining whether an image is intended to sexually stimulate the viewer by exhibiting a child's genital, pubic or rectal areas. These are: "(1) whether the focal point is on the child's genitalia or pubic area; [¶] (2) whether the setting is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; [¶] (3) whether the child is in an unnatural pose, or in inappropriate attire, considering the age of the child; [¶] (4) whether the child is fully or partially clothed, or nude; [¶] (5) whether the child's conduct suggests sexual coyness or a willingness to engage in sexual activity; [¶] (6) whether the conduct is intended or designed to elicit a sexual response in the viewer." (*Kongs, supra*, 30 Cal.App.4th at p. 1755.)

The six factors are not equally important, and an image need not satisfy each of the six factors for the photograph to show sexual conduct. (*Kongs, supra*, 30 Cal.App.4th at p. 1755.) "With the exception of factor No. 6 [conduct intended to elicit sexual response], a trier of fact need not find that all of the first five factors are present to conclude that there was a prohibited exhibition of the genitals or pubic or rectal area: the determination must be made based on the overall content of the visual depiction and the context of the child's conduct, taking into account the child's age." (*Ibid*.)

Applying the *Kongs* factors, we conclude that a trier of fact could not find the photographs Wilder took, whether through the bookshelf or while squatting near I.G., depict I.G. exhibiting her "genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer." (§ 311.4, subd. (d)(1).)

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[9] Although both parties refer to these as "the *Kongs* factors," the factors are actually derived from the federal court in *United States v. Dost* (S.D.Cal. 1986) 636 F.Supp. 828, 831. (*Kongs, supra*, 30 Cal.App.4th at p. 1754.)

It is undisputed there was no evidence in this case to support the second, third, fourth, or fifth factors. The second factor is whether the setting is sexually suggestive: I.G. here was seated in a public library, a place not normally associated with sexual activity. The third factor is whether the child is in an unnatural pose or wearing age-inappropriate clothing: There was no evidence that she posed for Wilder in any way and her attire was entirely appropriate for a person her age. The fourth factor is whether the child was fully or partially clothed, or nude: I.G. here was fully clothed at all times. Finally, the fifth factor is whether the child's conduct suggests sexual coyness or a willingness to engage in sexual activity: There was no evidence supporting this factor.

Consequently, the only *Kongs* factor left to examine is the first,[10] i.e., whether the focal point is on the child's genitals, pubic, or rectal area. In connection with this element, the record does not disclose any evidence presented to the jury besides Wilder's admission that he wanted to take a "butt shot" of I.G. Reyes testified that when she saw Wilder taking photographs through the bookshelf, I.G. was neither facing him, nor facing away, but rather that she was sitting sideways in relation to Wilder. Wilder said he was lurking by a bookshelf behind I.G., but he did not specify what direction she was facing as he tried to take these photographs. When Wilder took the video of I.G. after ducking underneath the table, that video was framed so that I.G.'s thighs and crotch were the focal point,[11] but there was no evidence as to how he framed the sub rosa photographs. Given I.G.'s positioning relative to Wilder as described by Reyes, Wilder was incapable of making the fully-clothed I.G.'s genitals, pubic, or rectal area the focal point of the deleted photos.

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[10] The sixth *Kongs* factor is also not at issue here since Wilder admitted that he intended to use the photographs to trigger a sexual response.

[11] This video, which was entered into evidence, formed the basis for counts 1 and 2. Even after viewing it, the jury was unable to reach a verdict on those charges.

We therefore conclude that a trier of fact could not find that any of the photographs of I.G. taken by Wilder involved any exhibition of her "genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer" and thus there could be no "sexual conduct" as defined in section 311.4, subdivision (d)(1). Accordingly, there was insufficient evidence to support Wilder's convictions for attempted possession of child pornography (§ 311.11, subd. (a), count 4) and attempted use of a minor for sex acts (§ 311.4, subd. (c), count 5).

Based on our finding that there was insufficient evidence to support the convictions on counts 4 and 5, we need not address Wilder's remaining arguments challenging those convictions or his challenge to the probation condition prohibiting him from possessing children's toys, games, or clothing. We also do not reach his claim that the trial court failed to award the appropriate amount of credits under section 4019. As we will remand the matter for resentencing on Wilder's remaining conviction for misdemeanor annoying or molesting a child (§ 647.6, subd. (a)(1), count 6), this argument is best addressed to the trial court at his resentencing if applicable.

III. DISPOSITION

The judgment is reversed. On remand, the court shall strike defendant's convictions on counts 4 and 5 due to insufficiency of the evidence and resentence defendant on count 6.

Greenwood, P.J.

WE CONCUR:

Bamattre-Manoukian, J.

Grover, J.

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